IN THE

United States Circuit Court of Appeals

For The Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellant,

vs.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Appellee.

No. 2033

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Reply Brief of Appellant

POST, AVERY & HIGGINS,
Attorneys for Appellant.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

BRUCE & BRYSON CO. 1910

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SHAW & BORDEN CO. 158361

The argument contained on page 10 of appellee's brief is a most forceful one in favor of our contention that the expression in the so-called contract, "the title to such property to be acceptable to the attorneys for this company," is not mere persiflage and was not so intended by the parties and can not be ignored by the courts. Appellee's argument is also persuasive in support of our further contention that it was the intent of the parties that the attorneys should determine what, if any, property the "company may lawfully acquire."

On page 34 of appellee's brief are cited numerous authorities asserted to be in support of its contention that the stipulation in the contract that the title must be acceptable to the attorneys for the company is met if a marketable title is tendered; and it is suggested that that rule has been laid down by the Supreme Court of Washington.

The case of Dean v. Williams, 56 Wash., 614, cited by appellee, is a case where the contract provided that the title should be acceptable to the *purchaser* and not to the attorney, and the fact that a different rule prevails under such a contract is settled by the authorities as stated in 39 Cyc., 1509 and 1510, cited in our opening brief at page 27.

The second Washington case cited, Wright v. Suydam, 72 Wash., 597, is not in point, as that is an action brought by the *vendee* against the vendor. This

question was not there involved. The other cases cited, with the exception of one, do not relate to the point at all, but are cases involving enforcibility of contracts providing for engineers' estimates, architects' certificates, and the like. The case involving an attorney's opinion, Boyd v. Hollowell, does not support appellee's contention.

While the question does not seem to us to be material, the fact is that the Supreme Court of Washington has repeatedly strictly enforced the provisions in building contracts providing for architects' certificates and engineers' estimates.

> See *Brown v. Winehill,* 3 Wash., 524;
> *Schmidt v. North Yakima,* 12 Wash., 121;
> *DeMattos v. Jordan,* 20 Wash., 315;
> *Dickerman v. Reeder,* 59 Wash., 405.

On page 15 of appellee's brief the point is made that if there is a valid judgment and a valid execution, failure to comply with the statute as to giving notice of sale does not affect the title of the purchaser at such sale although no notice was given. Citing three California cases: Smith v. Randall; Flood v. Light, and Frink v. Roe. Whether that is or is not the present California rule, we are not advised, but if so, it is contrary to all other authority as is expressly pointed out in 17 Cyc. p. 1276, Note 68, the text being:

> "In almost every jurisdiction, failure by the officer to give the proper notice of sale is sufficient ground for setting it aside where the motion is made by an interested party in due season."

The case of Boles v. Johnson, and following cases cited on page 15 of appellee's brief, do not hold as stated therein, but do hold that the remedy is not by action to recover possession of the property, but by motion made in the court where the judgment was rendered to set aside the sale. That question is clearly beside the issue, because, if the provision about the satisfaction of attorneys were nugatory, the purchaser must be tendered a title which is not subject to attack *by any one in any manner*. The authorities are cited in our opening brief.

The next point urged at the bottom of page 15 of appellee's brief is that the judgment debtor cannot move against the sale after the time for redemption has expired. The authorities cited at the top of page 16 of appellee's brief do not sustain the contention. In the Illinois case, twenty years had elapsed after the date of sale and the court held laches and acquiescence. In the Oregon case there had been an order of confirmation of sale and we believe that the rule is well settled that an order of confirmation cures irregularities not jurisdictional. In the case at bar there was no order of confirmation.

In the case at bar the judgment debtor was the purchaser at the foreclosure sale. Under the settled law of the state of Washington, it and its subsequent grantee (this appellee) are chargeable with notice of all irregularities in the judgment, execution and sale. This was decided in Hacker v. White, 22 Wash., 415, cited by this court in London & San Francisco Bank v. Dexter, Horton & Co., 126 Fed., 593.

That the purchaser from the judgment creditor, who was purchaser at the sale, stands in no different position than the judgment creditor, was expressly decided in Woodhurst v. Cramer, 29 Wash., at page 48. See also Lee v. Wrixon, 37 Wash., 47.

That the purchaser from the judgment creditor stands in no better position than the judgment creditor, is stated in the text of 17 Cyc., pages 1304-5-6.

On pages 13 and 14 of brief, appellee suggests that the findings in the foreclosure suit are no part of the judgment roll and did not find that Reynolds was the owner of the property, and that they "unfortunately are not printed with the record and appellee cannot in their absence quote from them on this point as it would like to do." Inasmuch as this foreclosure suit was brought in the Superior Court for Spokane county and the papers are on file in the Clerk's office in the City of Spokane, where counsel for appellee reside and have their office, it would be quite possible for them to quote from the findings if they desired so to do. As a matter of fact the findings are as stated in our opening brief, the same being Exhibit No. 7. That the findings in an equity case are not an unimportant part of the record in that case, is shown by the statute. Section 367, Vol. I., Remington & Ballinger's Annotated Codes & Statutes, being Sec. 5029 of Ballinger's Code, is as follows:

> "Upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be

separately stated. Judgment upon the decision shall be entered accordingly."

Sections 383 and 387 of the same code, being Sections 5052 and 5056 of Ballinger's Code, provide that if the defeated party shall desire to appeal to the Supreme Court, exceptions must be taken to the findings of the trial court.

On page 12 appellee suggests that the mortgage attempted to be foreclosed was for $200,000. While perhaps not material, it is certainly proper that statements of fact be reasonably correct. Finding No. 8, (Exhibit No. 7) is that the bonds actually certified under this trust deed aggregated only $39,700, and Findings of Fact numbered 15, 16, 17 relate to how these bonds were issued, and Conclusions of Law No. 2 is to the effect that the total amount to be recovered on these bonds under this decree is $14,142.55 plus interest from December 1, 1910. So the matter of redemption is not such an herculean task as would be imagined from appellee's statement. The fact that the accepted bid at the foreclosure sale was only $1500, the amount of the attorney's fees, and that the bondholders actually got nothing and would therefore naturally undertake to set aside such sale, is a matter that would naturally challenge the attention of an examiner of title, as pointed out in our opening brief.

The statement on page 27 of appellee's brief, that Mr. West had no particular knowledge of the Portland decree, is contradicted by Mr. West himself. (Transcript, page 81).

A remarkable argument not made in the court below or suggested in the trial judge's opinion is contained on pages 30 to 32, appellee's brief. This relates to the finality of attorney's opinion as to title. It is suggested that Mr. MacFarland's letter shows, first, that the only objection to title related to the bankruptcy proceeding; second, that that was not treated as final; and third, that the defendant is estopped to raise any other objection. The letter, on the other hand, clearly shows that the company declined to take the property because the attorneys had decided that (a) the title is defective and (b) that the company cannot lawfully acquire any part of this property. The testimony of Mr. Avery and Mr. West show beyond question that Mr. West was in frequent consultation with Mr. Avery in respect to the title, and also on one occasion with Mr. Post, and that he was advised that the title was defective not only as to bankruptcy proceedings, but also as to foreclosure proceedings. This letter, quoted on pages 30 and 31 of appellee's brief, also shows that the appellant suggested that Mr. West submit a statement of any expenses he may have incurred, if he had incurred any, subsequent to the writing of the letter set out in the complaint, with a view of having appellant reimburse him therefor, purely as a matter of equity. It further appears undisputed that the appellee's plant was physically connected with the consolidated exchange in Spokane, as set forth in the original letter, and through that exchange with the long distance lines running into Idaho and elsewhere, and that through

that connection the appellee was materially benefited. The authority cited in appellee's brief on page 32 itself demonstrates that there is no point to the argument, because it is not contended that any expense or any action was taken by the appellee on the strength of the letter of December 15, 1914. The only thing done was the commencement of this action about one month later.

The suggestion on page 39 of brief that the Bell interests had been compelled to sell the control of the Interstate Company *since* the making of the so-called contract set out in the complaint, is misleading. The final decree in the government suit requiring such sale was entered *before* this so-called contract, Exhibit No. 20, and Mr. West knew all about it. (Trans., p. 81).

The suggestion that a court of equity could enter a money judgment herein even though the appellant could not lawfully acquire any of the property, is most astounding. All authority is to the contrary. We have contended that the so-called contract could not reasonably be thus construed. Appellee contends to the contrary. This alone shows the correctness of our discussion that a decree of specific performance will never be granted unless the terms of the contract "are fair and so definite and certain that they cannot be reasonably misunderstood." (Opening brief, pages 18 to 22).

If appellee's contention were true, what would be the reason or consideration for appellant paying ap-

pellee this large sum of money? The consideration manifestly would not be a legal or lawful one, and if the appellee were correct in this argument as to the meaning of the contract, then the case would manifestly fall also under the principle of *ex turpi contractu non oritur actio* argued in our opening brief beginning at page 38. We believe all other matters are fully covered in our opening brief.

Respectfully submitted,

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